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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 693

THE UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 6) is reported in 6 F. Supp. 839. The opinion of the Circuit Court of Appeals (R. 10) is reported in 73 F. (2d) 265.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 13) was entered November 13, 1934. The petition for a writ of certiorari was filed February 9, 1935, and was granted March 4, 1935 (R. 14). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, after the repeal of the Eighteenth Amendment to the Constitution, the United States may recover upon a bond, executed pursuant to Section 26 of Title II of the National Prohibition Act, under which a boat seized under that Act had been released to the owner upon the condition that it be returned "on the day of the criminal trial to abide the judgment of the court", where it appears that the boat was not so returned and the crew of the boat had pleaded guilty to the charge of possessing intoxicating liquors as an incident of transportation and had been sentenced, prior to the repeal of the Eighteenth Amendment.

CONSTITUTIONAL AMENDMENT AND STATUTE INVOLVED

The Twenty-First Amendment to the Constitution of the United States (48 Stat. 1749, 1750; U. S. C. A., Constitution, Amendment XXI) provides as follows:

> SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the

Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Section 26 of Title II of the National Prohibition Act, authorizing the execution of the bond in question (c. 85, 41 Stat. 305, 315, Sec. 26; U. S. C., Title 27, Sec. 40), provides as follows:

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon

conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or aircraft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having a circulation in the county once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold

> and the proceeds, after deducting the expenses and costs, shall be paid into the Treasury of the United States as miscellaneous receipts.

STATEMENT

On July 31, 1930, the Collector of Customs of the Port of New York arrested one Hillary Cathell and one Adrian Van Austin and seized the motor boat "Wanda" with a cargo of intoxicating liquors for violation of the laws of the United States (R. 1, 2).

On October 31, 1930, the respondents as principal and surety, respectively, executed a bond (R. 4) for the release of the vessel, pursuant to Section 26, Title II, of the National Prohibition Act (R. 1, 3), conditioned, so far as here material, as follows (R. 4):

> if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court * * * then this obligation to be void, otherwise to remain in full force and effect.

The bond was duly approved by the Assistant Collector of Customs (R. 5).

On January 26, 1931, Cathell and Van Austin pleaded guilty to the charge of possession of intoxicating liquor and were sentenced (R. 1, 2–3). The possession charged was incident to transportation

of liquor on the "Wanda" (R. 3). The vessel was not then produced, nor was it produced at any time thereafter (R. 1, 3).

On July 19, 1933, the Government brought suit upon the bond (R. 1, 2). On August 25, 1933, an answer was interposed by the respondent Surety Company (R. 2). On December 5, 1933, the Twenty-First Amendment to the Constitution became effective (48 Stat. 1750).

On April 13, 1934, the respondent Mack moved to dismiss the suit upon the ground that the statute under which the bond was given had become inoperative by virtue of the repeal of the Eighteenth Amendment, relying upon the decision of this Court in the case of *United States* v. *Chambers,* 291 U. S. 217 (R. 2, 5–6).

On May 7, 1934, the District Court rendered an opinion sustaining the motion to dismiss (R. 6), and on May 21, 1934, an order granting the motion was entered (R. 7). This judgment was affirmed by the Circuit Court of Appeals (R. 13).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding the doctrine of *United States* v. *Chambers et al.,* 291 U. S. 217, to be applicable to the instant case.

2. In holding that the rights of the Government on the bond in question were no greater than its right of forfeiture of the vessel would be if the vessel were now in possession of the Government.

3. In holding that the bond contemplated the sovereign's continued power to confiscate.

4. In holding that the action does not depend wholly upon the common law.

5. In refusing to hold that, the right to be indemnified under the terms of this bond having accrued prior to the effective date of the Twenty-First Amendment to the Constitution, the enforcement of that right was not dependent upon the continued existence of the National Prohibition Act.

6. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

The decision of this Court in the *Chambers* case is limited to a "prosecution" in cases where no final judgment was rendered prior to ratification of the Twenty-First Amendment to the Constitution.

The courts below failed to take account of the difference between an action upon a bond and a criminal prosecution or a forfeiture proceeding and failed also properly to differentiate between the situation where sureties claim to be discharged before liability has arisen under a bond and one in which, as here, defenses are sought to be asserted *after* such liability has become "fixed." In the latter case, defenses available to the defendant upon criminal proceedings are not available to the surety.

It is established that a bond, under Section 26 of Title II of the National Prohibition Act, is con-

tractual in nature, and proceedings to collect after breach of condition do not depend upon the existence of the statute. If entered into for a lawful purpose and for a valid consideration, the liability of a surety upon a bond executed in pursuance of a statute may be enforced as a common-law or contractual obligation. The application of this rule is illustrated in cases where (1) statutes under which bonds have been executed either expire or are repealed, or where (2) the statutes under which bonds have been given are invalid.

Here the bond involved was once admittedly valid, the Government has released the property upon the promise that it would be returned or the Government made whole, and the condition of the bond has been broken while the surety and the principal have accepted the benefits of the contract. They would be unjustly enriched if, as a result of their failure to return the property when due, they are now permitted to become released from their obligation on the bond.

ARGUMENT

I

THE DECISION OF THIS COURT IN THE *CHAMBERS* CASE IS LIMITED TO A "PROSECUTION" IN CASES WHERE NO FINAL JUDGMENT WAS RENDERED PRIOR TO RATIFICATION OF THE TWENTY-FIRST AMENDMENT

In *United States* v. *Chambers*, 291 U. S. 217, this Court held (p. 222) that, upon the ratification of the Twenty-First Amendment to the Constitution,

"the National Prohibition Act, to the extent that its provisions rested upon the grant of authority to the Congress by the Eighteenth Amendment, immediately fell with the withdrawal by the people of the essential constitutional support." But this decision was limited (p. 222) to a "prosecution" and this Court excluded from the operation of the decision (p. 226) those cases "where final judgment was rendered prior to . . . ratification" of the Twenty-First Amendment.[1]

II

SINCE LIABILITY UNDER THE BOND HAD ALREADY BECOME "FIXED" UPON BREACH OF ITS CONDITION, THE COURT ERRED IN REGARDING THE DECISIONS INVOLVING DEFENSES PRIOR TO A DEFAULT AS APPLICABLE

The District Court determined (R. 7) that a forfeiture "could not now be granted; nor could it have been after the effective date of the 21st amendment", and hence "no judgment upon the bond which was given as bail for the vessel's return to the custody of the seizing officer; can be entered, for otherwise the surety could be held while the

[1] Both District Courts and Circuit Courts of Appeals have uniformly held that this decision did not operate to discharge prisoners or prevent execution of sentence after the repeal of the Eighteenth Amendment, where the judgment of conviction had become final prior to repeal. *Moss* v. *United States*, 72 F. (2d) 30; *United States ex rel. Voorhees* v. *Hill*, 72 F. (2d) 826; *United States ex rel. Nerbonne* v. *Hill*, 70 F. (2d) 1006; *Ellerbee* v. *Aderhold*, 5 F. Supp. 1022.

rest could not." The Circuit Court of Appeals determined (R. 12) that

> * * * the bond was a mere substitute for the arrested boat, the position of the Treasury ought not to be amended by the substitution; that the purpose in allowing the owner to secure immediate possession of his property, must be read as subjecting him to no more onerous conditions than if he had left it under arrest. Whether it be vehicle or bond, a sovereign's power to confiscate must exist; that the suit sounds in contract, that a bond is a "chose in action", cannot disguise the fundamental character of what is done.

The error of this will be discussed below under Point III, *infra*, p. 12.

The court below also (R. 12) stated:

> In accord is the ancient rule that *until* the bail is "fixed" he will be exonerated by anything which would discharge the principal from imprisonment were he surrendered; a fortiori by anything which would excuse his surrender. (Italics supplied.)

But in the case at bar the liability upon the bond had already become "fixed", and hence decisions regarding the discharge of sureties prior to the default of the principal are not applicable. After the bond has become liable for failure to produce the defendant, "the bail bond is a contract between the sureties and the government" and "the sureties

become debtors." *United States* v. *Davenport*, 266 Fed. 425, 427 (W. D. Texas). See to the same effect *United States* v. *Zarafonitis*, 150 Fed. 97, 99 (C. C. A. 5th); *Joelson* v. *United States*, 287 Fed. 106, 108 (C. C. A. 3d). Accordingly, in such case the surety is not entitled to discharge upon the ground that the principal had valid defenses against prosecution (*United States* v. *Davenport, supra; Archer* v. *Commonwealth*, 51 Va. 627), or that the principal has received a pardon (*Dale & Pollitt* v. *Commonwealth*, 101 Ky. 612; *Weatherwax* v. *Kansas*, 17 Kan. 427; *State* v. *Davidson*, 20 Mo. 212), or that the indictment is invalid or defective (*Southern Surety Co.* v. *United States*, 23 F. (2d) 55, (C. C. A. 8th), certiorari denied, 278 U. S. 604; *Hardy* v. *United States*, 71 Fed. 158 (C. C. A. 8th); *United States* v. *Evans*, 2 Fed. 147 (C. C. W. D. Tenn.); *Bell* v. *State*, 79 Tex. Cr. Rep. 407; *Reeve* v. *State*, 34 Ark. 610), or that the statute of limitations barred prosecution of the principal (*United States* v. *Dunbar*, 83 Fed. 151 (C. C. A. 9th)), or that the indictment was nolle prossed (*Detroit Fidelity & Surety Co.* v. *United States*, 59 F. (2d) 565 (C. C. A. 8th); *United States* v. *Sulvani*, 4 F. Supp. 775) (W. D. N. Y.), or that the indictment was never found (*Kepley* v. *People*, 123 Ill. 367), or that the defendant had died (*Detroit Fidelity & Surety Co.* v. *United States*, 59 F. (2d) 565 (C. C. A. 8th); *United States* v. *Costello*, 47 F. (2d) 684 (C. C. A.

6th)), or that, because of the ratification of the Twenty-First Amendment, the defendant could not be convicted if produced (*United States* v. *Russo*, 7 F. Supp. 391) (E. D. N. Y.).[2]

III

IT IS ESTABLISHED THAT A BOND UNDER SECTION 26 OF TITLE II OF THE NATIONAL PROHIBITION ACT IS CONTRACTUAL IN NATURE, AND PROCEEDINGS TO COLLECT AFTER BREACH OF CONDITION DO NOT DEPEND UPON THE EXISTENCE OF THE STATUTE

The condition of the bond herein was (R. 4) that the principal "return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court . . ." The boat was not returned, and the crew pleaded guilty to the charge of possessing intoxicating liquors; the complaint charges that "said possession of in-

[2] But see *United States* v. *Bryan*, 3 F. Supp. 249. Compare *Taylor* v. *Taintor*, 16 Wall. 366.

In this connection, in holding that "until the bail is 'fixed' he will be exonerated by anything which would discharge the principal", the court below cited *Beers* v. *Houghton*, 9 Pet. 329. That case and other cases cited involve release of debtors upon bond followed by a discharge in bankruptcy. *Beers* v. *Houghton* is not applicable here because this Court there held (pp. 356–358) that the bail was, by the statutes and rules of court, not "completely and definitively fixed" prior to the discharge of the principals. In accord is *Mannin* v. *Partridge*, 14 East 599; but see *Kelly* v. *Henderson*, 1 Pa. St. 495. In the case at bar, the liability on the bond had definitely become "fixed" before the repeal of the Eighteenth Amendment, as will presently be shown in the text.

toxicating liquors by said persons was incidental to transportation of said liquors on board the American motor boat 'Wanda'," (R. 2–3, 1).

Had the boat been produced, it would have been subject to a proceeding *in rem*. *United States* v. *One Ox-5 American Eagle Airplane*, 38 F. (2d) 106, 109 (W. D. Wash.). This could be done "in a summary way in the criminal cause" or "by proceeding upon a separate libel for forfeiture." *The Harbour Trader*, 42 F. (2d) 858, 859–860 (C. C. A. 2d). And see *United States* v. *Bryan*, 3 F. Supp. 249 (S. D. Texas). This is described as "not an original proceeding" but "merely ancillary to the criminal cause." The forfeiture "is not a part of the penalty prescribed for doing the act for which the defendants were convicted; it is a thing that is to follow from the fact of conviction, and is so contemplated by the statute." *United States* v. *One Stephens Automobile*, 272 Fed. 188, 191 (D. Oregon). And, where a bond was given under this statute for the release of property until trial, the contract was held not to be

> for liquidated damages. It was for indemnity. It guaranteed the United States against loss from letting the car out on bond. It obligated the principal and the sureties to make the United States whole against loss. It obligated them no further. * * * [The vehicle] not having been surrendered, the bond stands for the value of what was lost by the failure to surrender, and for no more.

United States v. *Warnell*, 67 F. (2d) 831, 832 (C. C. A. 5th). See to the same effect *United States* v. *Randall*, 58 F. (2d) 193, 194 (C. C. A. 2d); *United States* v. *One Ford Automobile*, 18 F. (2d) 338 (E. D. La.).

The general rule: The general rule is that the liability of a surety upon a bond executed in pursuance of a statute is not dependent upon the existence or validity of the statute. If entered into for a lawful purpose and for a valid consideration it may be enforced as a common-law or contractual obligation. This is illustrated in cases where (1) statutes under which bonds have been executed either expire or are repealed, or where (2) the statutes under which bonds have been given are invalid.

Repeal of statutes: In *United States* v. *Chambers, supra*, p. 223, this Court, upon the authority of decisions in which statutes had been repealed, determined that upon the repeal of the Eighteenth Amendment prosecutions under the National Prohibition Act could not continue. However, in cases where statutes under which bonds have been given are repealed, or expire, the bond is nevertheless held enforceable as a common-law or contractual obligation. *Darling* v. *Peck*, 15 Ohio 65; *Lewis* v. *Stout*, 22 Wis. 234; *Tucker* v. *Stokes*, 11 Miss. 124. And see *Lane* v. *Kusey*, 58 Ky. 410; *State* v. *Nichols*, 22 Ark. 61. A somewhat similar situation is presented where a bond given to secure payment of a tax liability is held enforceable though the lia-

bility for the tax has expired by limitation. *Gulf States Steel Co.* v. *United States*, 287 U. S. 32; *United States* v. *John Barth Co.*, 279 U. S. 370.

Invalid statutes: An even stronger case is presented where a bond is executed under a statute which is held unconstitutional. This Court has held that, where a bond

> is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors.

United States v. *Hodson*, 10 Wall. 395, 409. See to the same effect *Daniels* v. *Tearney*, 102 U. S. 415. This rule obtains generally (*Stevenson* v. *Morgan*, 67 Nebr. 69, 93 N. W. 180; *United States Fidelity & Guaranty Co.* v. *Ettenheimer*, 70 Nebr. 147, 99 N. W. 652; *State* v. *Stark*, 75 Mo. 566; *Southern Surety Co.* v. *Nalle & Co.*, 242 S. W. (Tex.) 197; *Fife* v. *Indemnity Ins. Co. of North America*, 283 S. W. (Tex.) 645; *State* v. *Mundy*, 53 N. D. 249, 205 N. W. 684; *U. S. Fidelity & Guaranty Co.* v. *Henderson County*, 276 S. W. (Tex.) 203; *Love* v. *McCoy*, 81 W. Va. 478, 94 S. E. 954), and applies as well to bail bonds where the statute under which the accused was indicted is unconstitutional (*United States* v. *Du Faur*,

187 Fed. 812 (C. C. A. 7th), certiorari denied, 223 U. S. 732; *People* v. *Rubright*, 241 Ill. 600; *State* v. *Surety*, 49 La. Ann. 909).[3]

The basis of these decisions, it may be noted, is that, having accepted the benefits of the contract, the surety will not be heard to deny its validity.[4]

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[3] A contrary rule seems to prevail in California (*Martin* v. *McCabe*, 21 Cal. App. 658, 132 Pac. 606; *Hampton* v. *Christensen*, 148 Cal. 729, 84 Pac. 200; *Montague* v. *Furness*, 145 Cal. 205, 78 Pac. 640; *San Francisco Lumber Co.* v. *Bibb*, 139 Cal. 192, 72 Pac. 64, and 139 Cal. 325, 73 Pac. 864; *Shaughnessy* v. *American Surety Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 700; but see *Peoples Lumber Co.* v. *Gaillard*, 136 Cal. 55, 65 Pac. 576), in New York (*Poole* v. *Kermit*, 59 N. Y. 554; *Brookman* v. *Hamill*, 43 N. Y. 554), and in Indiana (*Byers* v. *State*, 20 Ind. 47; *Cassel* v. *Scott*, 17 Ind. 514; *Marshall* v. *State*, 8 Blackf. 162; but see *State* v. *Lynch*, 6 Blackf. 395; *Spader* v. *Frost*, 4 Blackf. 190).

However, these decisions are distinguishable from the case at bar, for the bond herein was admittedly valid when given and when the breach of condition occurred.

[4] In the decisions, the bonds are also upheld upon the theory that good consideration passed to uphold the contract independently of statute; and the bond must not have been exacted under duress, either where the bond is unauthorized by statute or the statutory requirement is invalid. *United States* v. *Hodson*, 10 Wall. 395, 408; *Daniels* v. *Tearney*, 102 U. S. 415, 420–422. However, in the case now before the Court, the statute was admittedly existing and valid when the bond was given. To secure the release of property rightfully seized and in the possession of the Government, the parties voluntarily gave the bond; the condition of the bond was breached; and Cathell and Van Austin pleaded guilty and were sentenced—all before the Eighteenth Amendment was repealed. Regardless of the distinctions in the cases cited as to duress or the sufficiency of consideration, there was undoubtedly good consideration for the bond herein, and it was not secured by duress.

The case at bar is stronger, for the bond here involved was once admittedly valid, the Government has released the property upon the promise that it would be returned or the Government made whole, the condition of the bond has been broken while the surety and the principal have accepted the benefits of the contract. They would be unjustly enriched if, as a result of their failure to return the property, they are now permitted to become released from their obligation on the bond. The Government has been damaged, for if the vessel had been produced when required it could have been forfeited and sold and the proceeds covered into the Treasury.

Statutory authority unnecessary: Finally, it may be noted that it is not necessary that the bond herein be authorized by any statute. Accordingly, where a bond does not comply with the pertinent statute, it may nevertheless be sustained upon the general authority of the United States to enter a contract. *United States* v. *Hodson,* 10 Wall. 395, 406–408.

The United States may "enter into a contract, or . . . take a bond, in cases not previously provided for by some law." *United States* v. *Tingey,* 5 Pet. 115, 128. To the same effect see *United States* v. *Bradley,* 10 Pet. 343, 359, 360; *United States* v. *Linn,* 15 Pet. 290, 311. Thus, "the procedure to recover on the forfeiture of a bail bond is not controlled by the statutes of any state,

except so far as actions at law are controlled by the state practice, and therefore a debt resulting from the forfeiture of a bail bond for the appearance of a party in a criminal case may be enforced by *scire facias* in the court possessing the record or by an ordinary suit in any other court of competent jurisdiction" (*United States* v. *Zarafonitis,* 150 Fed. 97, 99 (C. C. A. 5th)), and "the courts of the United States may resort to such remedies for enforcing a bond or recognizance * * * as are given by the common law" (*United States* v. *Insley,* 54 Fed. 221, 223 (C. C. A. 8th)).

The courts below, merely because the bond here involved was authorized by Section 26 of Title II of the National Prohibition Act which fell with the repeal of the Eighteenth Amendment, have determined that the bond may not be enforced upon breach of condition occurring during the lifetime of the statute. Illustrative of the lack of substance in the distinctions drawn by the courts below is the fact that the District Court herein, in a subsequent case, has held that a bail bond, given for the return of a defendant held under the National Prohibition Act, "was not given under the prohibition law, and *U. S.* v. *Mack* (D. C.) 6 F. Supp. 839, therefore does not control." *United States* v. *Russo,* 7 F. Supp. 391 (E. D. N. Y.)

It is submitted that—whether Section 26 of Title II of the National Prohibition Act, under which the bond herein was given, is merely directory or

confers a right upon claimants to possession of the property pending trial of the criminal case, upon the execution of a proper bond—the bond became due and collectible as a common-law or contractual obligation, upon breach of the condition thereof, independently of the continued existence or validity of the National Prohibition Act. This has been the result reached by three District Courts *United States* v. *Herman H. Sohn* (D. C. R. I.), decided May 1, 1934, without opinion; *United States* v. *Biegert*, 8 F. Supp. 884 (D. C. N. J.); *United States* v. *E. & S. Motor Transp. Company*, 8 F. Supp. 844 (S. D. N. Y.), reversed, 73 F. (2d) 267 (C. C. A. 2d).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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